IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION.

CUSTOMS APPLICATION No.36/2001.

The Commissioner of Customs(E.P.)

..Applicant.

Vs.

M/s. Jupiter Exports,
and (3) Others. **Respondents.**

Mr A. S. Rao with Hina Shah for Appellant.
Mr D.B. Shroff with Mr S.N. Kantawala with Shilpa Balani i/b Yogesh Rohira for Respondent Nos. 1 to 4.

ALONGWITH

WRIT PETITION No. 794 of 2002.

M/s. Jupiter Exports, ..**Petitioner**

Vs.

Union of India and others. **..Respondents**

Mr D. B. Shroff with Mr S.N. Kantawala with Ms. Shilpa Balani i/b Yogesh Rohira for the Petitioner.

Mr. A. S. Rao with Ms Hina Shah for Respondent Nos. 1 to 4.

CORAM:DR. S.RADHAKRISHNAN,
AND V.C. DAGA,JJ.

DATE :6TH JUNE, 2007.

JUDGMENT (Per : Vijay C. Daga,J)
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1. These are two proceedings, one is Customs Application under Section 130(A) of the Customs act, 1962, ("the Act" for short) at the instance of the Commissioner of Customs (E.P.) ("the Revenue" for short) to seek

reference for the opinion of this Court, inter-alia, for deciding three questions of law referred to in the paras appearing hereinafter; another is a Writ petition filed under Article 226 of the Constitution of India being Writ Petition No. 794/2002, at the instance of the respondents in the application, i.e. M/s. Jupiter Exports, (the petitioner) seeking writ of mandamus directions against the Commissioner of Customs to implement the order passed by the Customs Excise, and Gold (Control) Appellate Tribunal, Mumbai. ("the "Tribunal" for short)

FACTS:
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2. The facts involved in both the proceedings are common. The petitioner is engaged in the business of export of fabrics and allied products.

3. The Commissioner of Customs (E.P.) issued a show cause notice alleging gross misuse of DEEC scheme adopting fraudulent means to obtain higher entitlement of duty

free imports of (Polyester Filament Yarn (P.F.Y.) and other raw materials under the DEEC scheme. It was alleged that after exporting 38,646.412 kgs of fabrics (containing 31,518 kgs of P.F.Y.) M/s. Jupiter Exports had altered the export permission (E.P. copies) of the shipping bills and enhanced quantity of exported goods (66,996.890 kgs) and consequently showed use of excess quantity of P.F.Y. in exported fabrics (60.295 kgs).

4. The E.P. copy was submitted to D.G.F.T. in order to obtain duty free Advance Licences for the import of P.F.Y. and disperse chemicals. The net excess weight of P.F.Y. shown was 45,221.155 kgs. It was alleged that on the basis of forged and fabricated documents M/s. Jupiter Exports (Petitioner) obtained a higher entitlement of duty free import licence of P.F.Y. and other permissible raw materials under the DEEC scheme. Since the Advance Licence was fraudulently obtained all the imports were

sought to be treated as without an Advance Licence. M/s. Jupiter Exports (the petitioner) was therefore, called upon to show cause as to why duty in the sum of Rs.17,12,306 should not be recovered from it as well from other noticees to the show cause for having the petitioner to evade customs duty.

5. M/s. Jupiter Exports, the petitioner firm filed it's reply taking various factual and legal defences and chose to deposit a sum of Rs. 1,01,00,000/- with the Adjudicating Authority, to avoid detention of it's partners under COFEPOSA Act, 1974.

6. The parties to the Show Cause Notice were heard by the Adjudicating Authority; namely, the Commissioner of Customs (General), who was pleased to hold that all the imports were to be treated without any advance licence as such duty payable on all imports were liable to be recovered from M/s. Jupiter Exports. The Commissioner of Customs was

pleased to confirm the entire duty demanded in the show cause notice i.e. Rs. 17,12,306 and imposed penalty of Rs. 18 lakh on each partner of the firm i.e. its main partner, as also two other sleeping partners namely, son and wife of the main partner. The Commissioner of Customs, thus, directed recovery of the total duty and penalties in the sum of Rs. 89,12,306 to be recovered from the deposit of Rs. 1,01,00,000/-.

7. At this stage, it will be relevant to note that the transferees of licences in question were exonerated in the Adjudication order and proceedings against them were dropped. Revenue accepted this order. With the result, order exonerating transferees became final and conclusive against the Revenue.

8. M/s. Jupiter Exports (the petitioner) not satisfied with the order of the Commissioner of Customs carried appeal to the Tribunal contending that it was neither

importer nor it could be styled as "deemed importer", either under Section 2 (26) or Section 28 of the Customs Act, as such it could neither be held responsible for imports made by the transferees nor penalty could be imposed on it.

9. The Tribunal after hearing both the parties came to the conclusion that duty has to be demanded in accordance with law and not on the basis of equity. That the demand for duty has to be based on law and not on moral consideration. That duty under Section 28 can only be recovered "from the person chargeable with duty". Such person "chargeable with duty" would be the importer alone in the case of import duty and exporter in the case of export duty. That the definition of the term of "importer" under Section 2 (26) covers only the person who causes the import of the goods but to any owner of the person holding himself out to be the importer at any time between their importation in the clearance for home consumption. As the bulk of the imports were

made by the bona fide transferees of the licenses obtained and sold by the petitioner, it could not be considered to be the importers as such no duty can be recovered from the original holder of the import licence. It was thus held that petitioner was liable to pay duty only to the extent of goods actually imported by it, quantified in the sum of Rs. 1.38 lakhs approximately, i.e. for the goods actually imported by it.

10. The Customs Department not satisfied with the aforesaid order of the Tribunal invoked jurisdiction of this Court under Section 130 (A) of the Customs Act to seek reference for opinion of this Court on following questions of Law.

a) Whether exports made by manipulating and forging the documents and creating false records and exporting items other than that declared in the shipping bill are liable for confiscation?

b) Whether the licence obtained by manipulation and forging the documents for creating false record so that the requirement of the DEEC scheme is fulfilled, is valid and legal?

c) Whether the licence holder or the transferee of the licence obtained by manipulation and forging documents are entitled to import validly, illegally and exempted from payment of duty?

11. At this juncture, it will be relevant to note that after filing of the above application to seek order from this Court Revenue did not take any step for a considerable long time. With the result, M/s. Jupiter Industries, petitioner, filed writ petition under Article 226 of the Constitution of India to seek implementation to the order of the Tribunal since their huge amount was lying with the Customs Department to which they were entitled. When the above petition came up for hearing, both proceedings were tagged and heard together.

RIVAL SUBMISSIONS:

12. The learned Counsel Mr Rao urged that since the licenses were obtained by manipulating and forging documents and creating false record, the transferees who

have imported goods, were not entitled to claim exemption. However, the exemptions have been granted in their favour holding them to be bona fide transferees. Inspite of grant of exemptions from payment of customs duty it is was open for the Custom's Department to follow the original licenses holding them to be deemed importers; and as such the Commissioner of Customs was justified in directing recovery of customs duty and penalty from the original license holder i.e. Transferor of License, M/s. Jupiter Exports. He, further submits that on the basis of forged licenses the requirement of DEEC scheme cannot be held to have been validly fulfilled. He, thus, submits that order of the Tribunal is liable to be set aside and the order of the Commissioner of Customs is liable to be restored.

13. Per contra, Mr. Shroff learned Senior Counsel appearing for the respondents urged that the order of the Tribunal is in consonance with the law laid down by this

Court and further submitted that under Section 28 of the Customs Act original licensee who has already parted with licence for consideration in favour of transferees cannot be held responsible for the goods imported by the transferees; especially, when the transferees were held to be bonafide purchasers having validly imported goods, entitled to exemption. He further submits that the concept of deemed import is neither recognized by Customs Act, or Rules framed thereunder nor notifications issued under the Act and Rules.

14. Mr Shroff further brought to our notice Notification No. 204/92-Cus dated 19th May, 1992, on which reliance was placed by the Commissioner of Customs; to hold that the original licence holder, namely, M/s. Jupiter Exports could be treated as "deemed importer" in terms of the said notification. We have perused each and every line of the Notification. It does not contain any such provision. We did not find any whisper in it

in this behalf. Mr Rao appearing for Revenue was specifically asked to put his finger on a line or a word of the notification in support of the findings recorded by the Commissioner of Customs. However, he found it difficult. Mr Rao fairly conceded that the notification does not spelt out such a concept of "deemed importer".

15. Mr Shroff without prejudice to his aforesaid contentions, alternatively urged that assuming while denying that duty in law be recovered from the original licence holder. There is no dispute that the actual export of PFY was 31,518 kgs contained in 36,646.412 kgs of fabrics. As per the Standard Input-Output Norms (SION) for every 1 kg of PFY the exporter can import 1.1 kgs of input. As against the entitlement of 34,669.800 kgs of PFY the total quantity imported was only 11,243.280 kgs. Hence no duty was payable for the imports made. In fact, according to him, the respondents/Transferees were, therefore, still entitled to import a further quantity of

23,426.520 kgs of P.F.Y duty-free.

16. Mr Shroff urged that in fact, the Commissioner in paragraphs 19 and 20, pages 73 and 74 of his order has, following earlier orders in similar cases, held that the entire export cannot be treated having zero value and that therefore, quantity actually exported has to be considered as eligible for the purposes of duty free importation and hence the duty liability as demanded in the show cause notice requires to be revised. However, erroneously or by mistake the Commissioner has confirmed the entire quantity of duty demanded in the show cause notice i.e. Rs. 17,12,306/-. Therefore, on the basis of Annexures "A and B" the show cause notice, read with paragraphs 19 and 20, pages 73 and 74 of the Commissioner's order, no duty whatsoever could have been demanded from the respondents.

17. Mr Shroff also tried to support each and every finding of the Tribunal contending that

the Tribunal was correct in rejecting the penalties imposed on the partners of the firm. According to him, it is now well settled that when the partnership firm itself is penalized, separate penalties cannot be imposed on the partners of that firm. He relied in case of **Swem Industries 2003 (154) ELT 417** (T). In any event, according to him, there was no warrant for imposition of penalty on the two sleeping partners, namely Mr Vikas Jakalia and Mrs. Premlata Jakarta, the son and the wife respectively the main partners of the firm. He submits that there is no evidence either in the show cause notice or in the order of the Commissioner that either of them had any role to play in the alleged manipulation or forgery nor is there any evidence or finding that they had any knowledge of the same. That the penalty on them was not justified at all. Mr Shroff submits that even the amount admittedly refundable under the order of the Commissioner has not been refunded despite several applications both to the Commissioner as well as the Tribunal. Hence, petitioner was

required to file writ petition to seek implementation of the order of the Tribunal in it's true letter and spirit.

18. He, thus, prayed for rejection of the appeal filed by the Revenue. At the same time, he urged that his writ petition seeking implementation of the order of the Tribunal is liable to be allowed, in the event, application filed by the Revenue is dismissed.

CONSIDERATION:

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19. Having heard the rival parties, no fault can be found with the view taken by the Tribunal. It is now well settled that when partnership is penalised, separate penalties cannot be imposed on the partners.

20. So far as first question is concerned it does not arise since the Commissioner itself did not confiscate any goods that were exported;

21. With regard to the second question, this question also does not arise for determination of this Court as the Commissioner has held that to the extent of actual exports, the respondents must be given the benefit of the license; so far transferees are concerned, their import cannot be touched or considered in this application, since order exonerating them is accepted by the Revenue.

22. With regard to the issue as to whether a license issued by the D.G.F.T. is valid or not is an issue that has to be determined by the D.G.F.T. and not the Customs Authorities. It is now well settled that until the licenses are cancelled by the licensing authority they are deemed to be valid. The Hon'ble Supreme Court in case of **Titan Medical Systems Pvt. Ltd vs. Collector of Customs, New Delhi 2003 (151) ELT 254 (SC)** has held that once an advance licence was issued and not questioned by the licensing authority, the Customs authorities cannot refuse exemption on an

allegation that there was no misrepresentation. If there was any misrepresentation, it was for the licensing authorities to take steps in that behalf. In the present case, the licensing authority sought to cancel the licenses, but in appeal, the order was set aside and remanded for denovo consideration. No further order has been passed thereafter. In the circumstances, till today the licenses are valid. Even if the license was subsequently cancelled, the Supreme Court in the case of **Sampat Raj Duggar Vs. Union of India 1992 (58) ELT 163 (SC),** following **East India Commercial Co. Ltd. v. Collector 1963 (3) S.C.R. 338** has held that on the date of the import the goods were covered by a valid import license. The subsequent cancellation of a licence is of no relevance nor does it retrospectively render the import illegal.

23. With regard to the third question of law, namely, "whether the license holder or the transferee of the license obtained by

manipulation and forging the documents for creating false records are entitled to import validly and legally and exempted from payment of duty?" This question relates to the transferee. As such it cannot be allowed to be raised in this application, since the Commissioner has held that the transferees of the license were entitled to import and no import duty could be recovered from them. However, held that the import duty could be recovered from the respondent-petitioner. The Tribunal negatived this and correctly held that duty under Section 28 could only be recovered from "a person chargeable to duty" and that such a person would be that the importer in the case of import and the exporter in the case of exports. The definition of the term "importer" under Section 2(26) of the Customs Act defines the term "importer" and does not cover a person who has not caused the import of the goods and who does not hold himself out to be the importer or the owner of the imported goods. As the respondents are not the importer. It

cannot be made chargeable to duty as the demand for duty has to be based on law and not on equity or moral considerations. The Tribunal rightly held that it was open to the department to proceed against a person who had obtained a license by fraud or misdeclaration in accordance with law.

24. For the reasons recorded, application is devoid of any substance and liable to be rejected. In the result, application is rejected with no order as to costs.

25. Having dismissed aforesaid application filed by the Revenue, now it has become obligatory on the part of the Commissioner of Customs to implement the order of the Tribunal. Amount to which M/s. Jupiter Exports are entitled was quantified in the sum of Rs. 98,62,000/- which has been deposited in this Court, and invested with the Nationalized Bank. Petitioner, thus, is entitled to get this amount with accrued

interest thereon. Hence we allow writ petition and hold that the petitioner is entitled to claim Rs.98.62 lac with accrued interest thereon. The Prothonotary and Senior Master is directed to pay full amount to the petitioner M/s. Jupiter Exports by A/c Payee's cheque. Rule is made absolute accordingly with no order as to costs.

26. Parties to act on an authenticated copy of this order which shall be issued as per procedure.

(V.C. DAGA,J) **(DR.S.RADHAKRISHNAN,J)**